BOWEN ET AL. V. CHASE ET AL.

Case No. 1,720.
{7 Blatchf. 255.}[1]

Circuit Court, S. D. New York. June 2, 1870.

REMOVAL OF CAUSES—APPLICATION—SUFFICIENCY OF AFFIDAVIT—AUTHENTICATION.

1. Where a suit is sought to be removed into this court from a state court, under the act of March 2d, 1867 (14 Stat. 558), the affidavit which is, by that act, required to be made and filed in the state court, must, at least in the absence of any controlling statute of the United States, be taken and certified in such manner as the state law requires in respect to the taking and certifying of affidavits to be received and used in the courts of the state.

{Cited in Sutherland v. Jersey City & B. R. Co., 22 Fed. 358.}

2. If such an affidavit purports to be taken and certified in conformity with the provisions of the state statute of New York of April 7th, 1869 (Laws N. Y. 1869, c. 133), it must have attached to it such a certificate as is required by the second section of that statute.

3. Where such an affidavit was entitled, "In the Supreme Court of the State of New York," followed by the names of the parties at full length, and stated that the affiant "is one of the plaintiffs in the suit above entitled and that he has reason to believe and does believe that, from prejudice and local influence, he will not be able to obtain justice in this court": *Held* that such affidavit was a substantial compliance with the provision of the said act of 1867, requiring the party to make an affidavit, stating "that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court."

{Cited in Fisk v. Henarie, 32 Fed. 421; Whelan v. New York, L. E. & W. R. Co., 35 Fed. 862.}

{At law. Actions of ejectment by Champlain Bowen and others against Nelson Chase and others. Defendants moved to strike the causes from the docket, and plaintiffs moved for a commission. Defendants' motion denied, and plaintiffs' motion as to case No. 3 granted.}

Charles Tracy and Clarence A. Seward, for plaintiffs.

Charles O'Conor and James C. Carter, for defendants.

BLATCHFORD, District Judge. Three of these suits, of which there are four with the same title, are known as Nos. 1, 2 and 4. They, as well as suit No. 3, are actions of

ejectment originally brought in the supreme court of the state of New York. On the 30th of October, 1869, the plaintiffs in each suit of those known as Nos. 1, 2 and 4 filed in that court a petition for the removal of the suit into this court, verified by them, and also certain affidavits accompanying the petition, and a bond offered as the surety required on such removal. On the 13th of November, 1869, a motion was made in the state court, in each suit, by the plaintiffs, on notice to the defendants, that the bond be accepted. When the motions came on to be heard, in each case, the petition was read, and the counsel for the plaintiffs then proposed to read the affidavits verifying the petition, and also the other affidavits before mentioned as accompanying the petition. This was objected to on the part of the defendants, on the ground that none of the affidavits were made or authenticated in such manner as to entitle them to be read. The court sustained the objection, and then made an order in each case reciting the proceedings and dismissing the petition. Notwithstanding this, the plaintiffs have, in each case, filed in the office of the clerk of this court certain papers purporting to be copies of the process, pleadings, depositions, testimony and other proceedings therein, exemplified or certified by the clerk of the state court, and have caused each suit to be docketed in this court, or its title to be entered in the book wherein entries are made of the proceedings taken in causes pending in this court The defendants, claiming, in each case, that it has not been lawfully removed to this court and is not pending therein, now move that it be stricken from the docket of this court, and that all entries in respect to it be stricken from the books in the office of the clerk of this court, and that the papers so filed be stricken or taken from the files of this court. The plaintiffs, claiming, in each case, that it is pending in this court by removal from the state court, move for a commission to examine certain persons in Rhode Island as witnesses therein.

The removal in these cases was sought to be effected under the act of March 2d, 1867 (14 Stat. 558), which provides as follows: "Where a suit is now pending or may hereafter be brought in any state court, in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, such citizen of another state, whether he be plaintiff or defendant, if he will make and file in such state court an affidavit stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court, may, at any time before the final hearing or trial of the suit, file a petition in such state court for the removal of the suit into the next circuit court of the United States to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of all process, pleadings, depositions, testimony and other proceedings in said suit, and doing such other appropriate acts as, by the act to which this act is amendatory" (Act July 27, 1866; 14 Stat. 306),"are required to be done upon the

removal of a suit into the United States court; and it shall be thereupon the duty of the state court to accept the surety and proceed no further in the suit; and, the said copies being entered as aforesaid in such court of the United States, the suit shall there proceed in the same manner as if it had been brought there by original process."

The only material question for consideration in the view I take of these cases is, as to whether the affidavit accompanying the petition, and purporting to be the affidavit required by the act of 1867, was authenticated in such manner as to entitle it to be used in the state court for the purpose for which it was, under that act, offered to be used. I do not speak of the affidavit verifying the petition. The act does not expressly require the petition to be verified by affidavit In that respect it differs from the act of March 2d, 1833 (4 Stat. 632), and from the act of March 3d, 1863 (12 Stat. 755), both of which acts expressly require the petition for removal to be verified by affidavit. I confine the inquiry to the affidavit mentioned in the act of 1867. The act requires the affidavit to be made and then to be filed in the state court; and it prescribes what the affidavit shall state.

Although the affidavit is one to be made for the purpose of securing a privilege created by a law of the United States, and although the making of the affidavit is prescribed by a law of the United States, yet the affidavit is one which is to be received and used in a judicial proceeding pending in a state court; and it cannot be doubted that it must be taken and certified, at least in the absence of any controlling statute of the United States, in such manner as the state law may require in respect to the taking and certifying of affidavits to be received and used in the courts of such state. It is not claimed that the affidavits in these cases were taken or certified in conformity with any statute of the United States prescribing the mode of taking or certifying them; and the act of 1867 merely says that the affidavit is to be made and filed in the state court. The affidavits in question were made to be used in the state court. They were made to be filed in the state court, that is, to be received by such court in judicial proceedings therein. Unless the affidavit is so first filed there can be no removal of the suit.

The affidavits here were evidently intended to be taken and certified in conformity with the provisions of the act of the legislature of the state of New York, passed

april 7th, 1869 (Laws N. Y. 1869, c. 133). That act provides as follows: "Section 1. In cases where by law the affidavit of any person residing in another state, or in any territory of the United States, is required or may be received in judicial proceedings in this state, the same may be taken and certified by any officer authorized by the laws of such state or territory to administer oaths and take and certify affidavits to be used in the courts of record of such state or territory. § 2. To entitle such oath or affidavit to be read in the courts of this state, there shall be stated in the body of such affidavit, the name, residence, age and occupation of the deponent or affiant, and there shall be attached to the jurat or affidavit a certificate, under the name and official seal of the clerk, register, prothonotary or other officer authorized by the laws of such other state to make such certificate, of the county in which the officer taking and certifying such oath or affidavit resided, specifying that such officer was, at the time of taking such oath or affidavit, duly authorized to take the same, and that such clerk, register, prothonotary or other officer is well acquainted with the handwriting of such officer, and verily believes that the signature to such jurat or certificate is genuine, and that such oath or affidavit purports to be taken in all respects as required by the laws of such state or territory; and such oath or affidavit so taken and certified may be read in any court or before any officer in any suit or proceeding in this state, with like force and effect as if such oath or affidavit had been taken before any officer authorized by law to take affidavits in this state to be read in courts of record."

The plaintiffs in these cases resided all of them in. the state of Rhode Island, and the affidavits were all of them taken in that state. There being several plaintiffs in each case, they did not all unite in one affidavit in each case, but several affidavits were made in each case, each affidavit being made by different plaintiffs. Some of the affidavits in a case were taken by a justice of the peace and some by a public notary. The authority of these officers to take the affidavits, as being officers provided for by the first section of the New York statute of 1869, is not questioned. The difficulty is with the forms of the certificates attached to the affidavits, as not being in the form required by the second section of that statute. In respect to the justice of the peace, the certificates are made by the clerk of the supreme court of Rhode Island within and for the county of Providence. In respect to the public notary, the certificates are made by the clerk of the court of common pleas of Rhode Island within and for the county of Providence. None of the certificates state, as is required by the New York statute, that the clerk making them is well acquainted with the handwriting of the officer taking the affidavits, and the certificates in respect to the public notary fail to state that the affidavits taken by him purport to be taken in all respects as required by the laws of Rhode Island. There is nothing in the certificates that amounts in substance to a compliance with the New York statute in these particulars.

There is no question here of any attempt by the state, by legislation, to embarrass the exercise of the privilege of removing a cause into the federal court. The requisitions of

the state statute as to the form and contents of the certificate are not unreasonable, and any person seeking to have received or used, in a judicial proceeding in a court of the state of New York, an affidavit made by a person residing in another state, taken by such an officer as is specified in the first section of the New York statute of 1869, must have attached to such affidavit a certificate specifying in substance the particulars required to be specified therein by the second section of that statute; otherwise, the affidavit is not entitled to be received or used in a court of the state of New York. Such was undoubtedly the view of the court which dismissed the petitions, and there is no sound principle on which the correctness of that view can be questioned. It is equally clear, that the affidavit must be one that is entitled to be received or used in the state court, before it can be employed in effectuation of a removal of the suit to the federal court.

It follows, that the motion of the defendants must be granted and the motion of the plaintiffs be denied, as to cases Nos. 1, 2 and 4. As to case No. 3, the proceedings in it, for the removal of the cause, have been the same as those in the three cases of the same title, known as Nos. 1, 2 and 4, with certain exceptions hereafter mentioned, and the same motions are now made in it as in cases Nos. 1, 2 and 4, with the addition, that the defendants move that it be remanded to the state court On papers in all respects the same as those in cases Nos. 1, 2 and 4, the state court made an order that the prayer of the petition be granted and that such state court proceed no further in the action. The defendants did not, in the state court, take the objections to the forms of the certificates attached to the affidavits, which they took to the forms of the certificates attached to the affidavits in cases Nos. 1, 2 and 4, but expressly waived such objections, and they have expressly waived them in open court, in this court, on these motions. This applies not only to the affidavits provided for by the act of 1867, but also to the verifications of the petitions.

The only ground urged, in case No. 3, for remanding the case to the state court, is, that no one of the plaintiffs states in his affidavit that he "has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in

such state court." Each affidavit is entitled thus: "In the supreme court of the state of New York," followed by the names of the parties at full length. The affiant states, that he "is one of the plaintiffs in the suit above entitled," and that he "has reason to believe and does believe that, from prejudice and local influence," he "will not be able to obtain justice in this court." This is a substantial compliance with the act of congress. The motion of the defendants is denied and the motion of the plaintiffs is granted, as to case No. 3.

{NOTE. For the disposition in the supreme court of a bill to establish defendant's title, and to enjoin prosecution of the actions herein, see Bowen v. Chase, 94 U. S. 812; and, for the final disposition of one of the actions herein, see AS U. S. 254.}

[1] {Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.}